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## **Civic Republican Political Theory and Labour Law**

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## **Abstract**

"A number of justifications have been, and are, cited in favour of legal intervention in the field of labour law. The traditional approach has been to stress the role of labour laws in correcting the imbalance in bargaining power inherent within the employment relationship. Thus, "the main object of labour law has always been, and [...] will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship" (Davies and Freedland (eds), Kahn-Freund's *Labour and the Law*, 3rd edition (London, Stevens, 1983)). Kahn-Freund makes the point that labour legislation has interfered in the employment relationship, e.g. to regulate terms and conditions of employment, and furnish rules on the hiring and dismissal of employees, as well as the basic work-wage bargain or the exchange of the worker's services in return for remuneration. Labour law has also indirectly provided support for the effective functioning of collective bargaining under the umbrella of 'collective laissez-faire'.

However, in the contemporary context, the concern with the correction of inequalities in bargaining power via the prophylactic of labour laws or the social practice of collective bargaining has lost much of its force. Economists have attacked the notion that legal intervention is required to offset the unequal exchange of resources between the employee and the employer. Equally, the 'inequality of bargaining power' justification for labour law has been criticised for its lack of normative precision. The premise of the correction of imbalances in bargaining strength between the worker and the employer has therefore given way to two further justifications for labour law. First, by linking labour law closely to the functioning of the labour market and thereby anchoring it firmly within a market-driven ideology, there appears a perceived need to regulate labour market failures in order to achieve efficient labour markets. Second, a continued focus on the traditional social objectives of labour law gives way to a realisation of social justice through the repulsion of the 'economic logic of the commodification of labour' (H. Collins, *Employment Law*, 2nd ed. (Oxford, OUP, 2010) 5). However, much like 'inequality of bargaining power', neither of these two justifications offers an all-encompassing explanation for labour law's interference in contemporary employment relationships.

Following a brief analysis of the various rationales for labour law and their inadequacies, this paper therefore turns to political theories of social justice and domination to give a sketch of an alternative basis for intervention in the employment relationship. The paper draws upon works by Philip Pettit and Frank Lovett in the field of civic republican political theory to explore whether the employment relationship should be treated as one of the types of social relationship which are generally characterised by domination by one party (the employer) over another (the employee). If so, then there is an argument that labour law's purpose can be defined as rules, principles and doctrines forged by the common law and shaped by domestic and international legislation which are concerned with the minimisation of the domination exerted by an employer over an employee."

**Keywords**

Labour Law, Employment Law, Contract of Employment, Statutory Employment Protection, Employment Rights, Labour Rights, Civic Republican Political Theory, Non-domination Theory, Liberty

**Civic Republican Political Theory and Labour Law**

*David Cabrelli\* and Rebecca Zahn\*\**

1. Introduction

Several justifications are cited in the academic literature in favour of common law and statutory intervention in the field of labour law. First, there is the traditional ‘inequality of bargaining power’ rationale. This justification shares some commonalities with the second rationale, namely that labour laws are an integral part of the package that must be put in place to prevent the commodification of labour and achieve social justice and a more egalitarian society, in terms of the appropriate distribution of resources and opportunities. Finally, in recent times, the ‘law of the labour market’ school of thought has sought to conceptualise labour law as a discipline in more economic terms, in the sense that it promotes, and ought to promote, a regulated labour market that is well-functioning for the benefit of all. However, these justifications have been criticised for ignoring the realities of the contemporary labour market where increasing numbers of people work outside the confines of standard employment contracts and for even bothering to undertake such a ‘sterile’ exercise as attempting to identify a theoretical explanation for the discipline in the first place.<sup>1</sup> One must therefore ask to what extent traditional justifications for the legal regulation of the employment relationship have become frayed at the edges as a result of changes in underlying political, social, economic and industrial conditions over the past half century. For example, to what extent do such developments render the orthodox rationales

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<sup>1</sup> B. Hepple, ‘Factors Influencing the Making of Labour Law’ in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 30.

outmoded or redundant? In response to this question, a strand of academic literature has emerged which offers alternative theoretical support for the regulation of the work relationship.

This chapter seeks to contribute to this debate by demonstrating how an account of justice based on ‘non-domination’ grounded in contemporary civic republican political theory and associated with scholars such as Philip Pettit and Frank Lovett can prove helpful in shedding new light on the rationales for labour law intervention in the 21<sup>st</sup> century. In order to do so, this chapter first summarises the traditional justifications for common law and statutory intervention in labour law and probes the accompanying objections. A second section pinpoints the position of non-domination civic republican theory in political philosophy and sets out some of the advantages of adopting it as a justification for labour laws. Against this background, the chapter then goes on to consider the extent to which non-domination theory can present an accurate descriptive account of the design and objectives of, and the range of individuals and policy areas falling, and contained within, the sweep of, labour laws. The discussion moves on to provide a brief sketch of the potential benefits of non-domination theory in terms of its ability to chart a normative programme for the reform of labour law and the final section concludes.

## 2. The orthodox rationales for labour law intervention

In this section, we identify and explore the oft-versed deficiencies in the competing justifications for the introduction and preservation of labour laws. Here, we take the lead from Collins, who divided these rationales into two differing camps, depending on whether they are rooted in a ‘social justice’ or ‘efficiency’ strand.<sup>2</sup> Turning first to the social justice-based ideological drivers, we focus on two distinct justifications for individual and collective

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<sup>2</sup> H. Collins, ‘Theories of Rights as Justifications’ in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 137.

labour laws, namely ‘equality of bargaining power’ and ‘social equality/inclusion’. The emphasis on correcting the inequality of bargaining power inherent within the employment relationship has formed the classic account for regulatory intervention. The common law governing the regulation of the relationship between employer and worker has, at its heart, a belief in the equality of legal persons before the law. However, as noted by Von Gierke,<sup>3</sup> Sinzheimer,<sup>4</sup> and Kahn-Freund,<sup>5</sup> the private law protection of freedom of contract is seen as unjust in the sense that the recognition of formal equality underpinning that doctrine thinly conceals the inevitable inequality of bargaining power inherent in the relationship. Or, as the Webbs put it, “whenever the economic conditions of the parties are unequal” as they are in the majority of employment relationships, “legal freedom of contract merely enables the superior in strategic strength to dictate the terms.”<sup>6</sup> The fictional notion of equality of the contracting parties simply tends to perpetuate the domination of the employer over the worker and the latter’s dependence on the former.<sup>7</sup> As such, labour law supplements rather than supplants private law in order to reduce the domination of the employer by ‘emancipat[ing] the worker from the relationship of subordination to the [employer], ‘to temper the employer’s power to command.”<sup>8</sup> Seen from this perspective, the mission of labour law has been to override the freedom of contract doctrine to some extent by protecting workers on the ground that they suffer from an inequality of power in the contractual bargaining process. In the context of labour relations, ignoring the inevitable divergences in the power of management and labour is not necessarily a desirable approach and is one that, over the past fifty years or so, has been altered and amended by Parliament thereby nudging the power balance in a pro-employee direction. Traditionally, therefore, “the main object of labour law has always been, and [...] will always be, to be a countervailing

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<sup>3</sup> O von Gierke, *Die soziale Aufgabe des Privatrechts* (Berlin, 1889), cited in A. Seifert, “‘Von der Person zum Menschen im Recht’-sum Begriff des sozialen Rechts bei Hugo Sinzheimer” (2011) 2 *Soziales Recht* 62, 64.

<sup>4</sup> H. Sinzheimer, ‘Demokratisierung des Arbeitsverhältnisses’ (1928) in H. Sinzheimer, *Arbeitsrecht und Rechtssoziologie: gesammelte Aufsätze und Reden* (Frankfurt, Cologne, 1976) 115-124.

<sup>5</sup> P. Davies and M. Freedland (eds), *Kahn-Freund’s Labour and the Law*, 3<sup>rd</sup> edition (London, Stevens, 1983) 18.

<sup>6</sup> S. and B. Webb, *Industrial Democracy* (London, Longmans, Green, 1920) 217.

<sup>7</sup> R. Dukes, *The Labour Constitution* (Oxford, OUP, 2014) 16.

<sup>8</sup> *Ibid.* 17.

force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship”<sup>9</sup>.

In the contemporary context, the concern with the correction of inequalities in bargaining power via the prophylactic of labour laws or the social practice of collective bargaining lacks clarity in its concept and has lost much of its force for a variety of reasons.<sup>10</sup> First, the ‘inequality of bargaining power’ justification for labour law has been criticised for its lack of precision in respect of the kinds of labour laws it may be used to justify: to the extent that it is at once under-inclusive, insofar as it is unable to identify specifically the individuals who should and should not fall within the protective coverage of labour laws,<sup>11</sup> as it is over-inclusive, inasmuch as consumers, franchisees and some commercial agents also labour under unequal bargaining power in the contracting process, but by no means can we conceptualise consumer, franchise or agency laws as simply subsets of labour law. Equally, scholars have criticised the notion of bargaining power imbalances as the key driver for labour law intervention on the basis that it is overly grounded in the notion of subordination or dependency in work relationships, which are two concepts that do not necessarily map on neatly to disadvantage or vulnerability in such personal relations which ought more properly to be the target of such laws.<sup>12</sup> Third, the lack of interest of legislatures and governments in worker protection when enacting employment legislation, e.g. through more balanced and sustainable employment contracts, is amply demonstrated by the emphasis placed instead

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<sup>9</sup> P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law*, 3<sup>rd</sup> edition (London, Stevens, 1983) 18.

<sup>10</sup> For a spirited rejoinder reasserting the relevance of this concept as a justification for labour laws, based on the idea of labour laws curtailing the social ‘power’ of the employer as a means of expanding the scope of the human freedom of the employee, see R. Dukes, *The Labour Constitution* (Oxford, OUP, 2014) 212-215. To that extent, whilst inequality of bargaining power may no longer have the capacity to offer up a central defining narrative for the regulation of the employment relationship, as will become clearer, the significance of the inevitable imbalance in the social power relations between employers and employees cannot be discounted as one of the components of any justification for labour law as an autonomous field of enquiry.

<sup>11</sup> B. Langille, ‘Labour Law’s Theory of Justice’ in G. Davidov and B. Langille (eds.), *The Idea of Labour Law* (Oxford, OUP, 2011) 105–10.

<sup>12</sup> M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (Oxford, OUP, 2011) 370-371 and 438-439. See also H. Arthurs, ‘The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems’ (2010) 19 *Social & Legal Studies* 403, 404.



on designing systems that enhance business competitiveness and flexibility.<sup>13</sup> Fourth, traditional methods of regulation through individual labour laws or standard-setting through collective bargaining both fail to take account of the range of methods by which working conditions are determined in a large proportion of workplaces, such as through individual agreement, or unilateral imposition. In addition, economists have attacked the notion that legal intervention is required to offset the unequal exchange of resources between the employee and the employer.<sup>14</sup> They argue instead that “asymmetrical bargaining power does not prevent the free negotiation of any term or condition that the employee is prepared to pay for.”<sup>15</sup> As such, for a variety of reasons, whilst the inequality of bargaining power justification is not necessarily inaccurate and cannot be easily dismissed as outmoded in every case, it does fail to convince as a universal account.

We are thus left with two further justifications for labour law. The first is rooted in the social justice-ideological strand, the development of which has coincided with vast changes in the UK labour market in the form of the structural reorganisation of working patterns and the industrial bases of developed economies over the past 40 years. This rationale clings faithfully to the traditional social objective of labour law with its emphasis on the redistribution of wealth, resources and power away from the employer to the employee. Such continued focus gives way to a realisation of social justice through the repulsion of the ‘economic logic of the commodification of labour’<sup>16</sup>. Or, to put it differently, “the principal aim of labour law is to steer towards a particular conception of social justice, such as a more egalitarian society, and the norms of labour law are required primarily for the instrumental purpose of securing that

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<sup>13</sup> P. Davies and M. Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (Oxford, OUP, 2007) 5.

<sup>14</sup> See H. Spector, ‘Philosophical Foundations of Labour Law’ (2006) 33 *Florida State University Law Review* 1119, 1133.

<sup>15</sup> *Ibid.*, 1133. Yet, this notion of employers agreeing to all benefits and protections provided employees are willing and able to cover their costs depends on the effective functioning of the labour market which, in most sectors, describes fiction rather than fact.

<sup>16</sup> H. Collins, *Employment Law*, 2<sup>nd</sup> ed. (Oxford, OUP, 2010) 5. See also the discussion in G. Davidov, *A Purposive Approach to Labour Law* (Oxford, OUP, 2016) 62-64 and 68.

goal.”<sup>17</sup> This formulation chimes with the line of thought which treats employment laws as state-sanctioned norms that seek to promote social equality or equal autonomy, i.e. rules motivated by the desire to avoid social inequality and to ensure parity of status and power so that the employee and employer are afforded an equivalent degree of regard and deference in the workplace and by wider society.<sup>18</sup>

We now turn to the second ideological driver for labour laws, which is the ‘efficiency’ thread.<sup>19</sup> In the contemporary context, the mainstream justification rooted in ‘efficiency’ finds its expression in the ‘law of the labour market’ discourse, whose principal proponents

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<sup>17</sup> Ibid. See also H. Collins, ‘Justifications and Techniques of Legal Regulation of the Employment Relation’, in H. Collins, P. Davies and R. Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer, London, 2000) 4 and 26, B. Hepple, ‘Factors Influencing the Making of Labour Law’ in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 32-34, B. Hepple, *Labour Laws and Global Trade*, (Oxford, Hart Publishing, 2005) 262 and S. Deakin and F. Wilkinson, ‘Labour Law and Economic Theory: A Reappraisal’ in H. Collins, P. Davies and R. Rideout (editors), *Legal Regulation of the Employment Relation* (Kluwer, London, 2000) 42–47.

<sup>18</sup> See S. R. Bagenstos, ‘Employment Law and Social Equality’ (2013) 112 *Michigan Law Review* 225, 237, H. Spector, ‘Philosophical Foundations of Labour Law’ (2006) 33 *Florida State University Law Review* 1119, 1144-47 and M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York, Basic Books, 1983) at page xiii. In this chapter, we leave to one side the growing trend for dignitarian-based justifications to be advanced for the subject of labour law, on which see G. Davidov, ‘A Purposive Interpretation of the National Minimum Wage Act’ (2009) 72 *Modern Law Review* 581, 592-594, G. Davidov, *A Purposive Approach to Labour Law* (Oxford, OUP, 2016) 59-62, and M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (Oxford, OUP, 2011) 49 and 371-376. For a sceptical note on this dignitarian foundation, see C. McCrudden, ‘Labour Law as Human Rights Law: A Critique of the Use of ‘Dignity’ by Freedland and Kountouris’ in A. Bogg, C. Costello, ACL Davies and J. Prassl (eds.), *The Autonomy of Labour Law* (Oxford, Hart Publishing, 2015) 289.

<sup>19</sup> H. Collins, ‘Theories of Rights as Justifications’ in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 137.

are Deakin and Wilkinson,<sup>20</sup> Collins,<sup>21</sup> Davies and Freedland,<sup>22</sup> and Mitchell and Arup<sup>23</sup> (admittedly, each with varying degrees of enthusiasm). This is closely linked to the functioning of the labour market and is anchored within a market-driven ideology. The justification stresses the need to regulate labour market failures in order to achieve efficient labour markets.<sup>24</sup> The basic claims associated with this approach are utilitarian in their foundation: that governments treat one of the principal objectives of labour law to be labour market regulation for the benefit of all members of society; and that such a regulatory set of techniques does not necessarily impose costs, since it can correct imperfections in the labour market and enhance overall efficiency. As Collins explains, it “appeals to efficiency or welfare considerations, in order to justify rules that address market failures caused by transaction costs and asymmetric information, problems arising in the governance of contracts of employment such as coercion and opportunism, and more generally the desirability of promoting productive efficiency and competitiveness through a well-coordinated and flexible division of labour.”<sup>25</sup> Such a rationale underlies, for example, much of the European Commission’s proposals on labour market regulation since the beginning of the 21<sup>st</sup> century

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<sup>20</sup> S. Deakin and F. Wilkinson, “Labour Law and Economic Theory: A Reappraisal” in H. Collins, P. Davies and R. Rideout (editors), *Legal Regulation of the Employment Relation* (Kluwer, London, 2000) 29, S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford, OUP, 2005) and S. Deakin, ‘A New Paradigm for Labour Law? A Review of C. Arup, P. Gahan, J. Howe, R. Johnstone, R. Mitchell, A. O’Donnell (eds.), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Sydney, The Federation Press, 2006)’ (2007) 31 *Melbourne University Law Review* 1161.

<sup>21</sup> H. Collins, “Regulating the Employment Relationship for Competitiveness” (2001) 30 *Industrial Law Journal* 17 and H. Collins, “Justifications and Techniques of Legal Regulation of the Employment Relation”, in H. Collins, P. Davies and R. Rideout (eds.), *Legal Regulation of the Employment Relation* (London: Kluwer, 2000) 9.

<sup>22</sup> P. Davies and M. Freedland, *Labour Law: Text and Materials*, 2nd edition (London, Weidenfeld and Nicholson, 1984) and P. Davies and M. Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (Oxford, OUP, 2007).

<sup>23</sup> C. Arup, P. Gahan, J. Howe, R. Johnstone, R. Mitchell, A. O’Donnell (eds.), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Sydney, The Federation Press, 2006).

<sup>24</sup> See P. Davies and M. Freedland, *Labour Law: Text and Materials*, 2nd edition (London, Weidenfeld and Nicholson, 1984) 1-11, S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford, OUP, 2005) 5-35 and A. Hyde, “What is Labour Law?” in G. Davidov and B. Langille (eds.), *Boundaries and Frontiers of Labour Law* (Oxford, Hart Publishing, 2006) 37. For a critique, see R. Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford, OUP, 2014) 92-122 and 194-221.

<sup>25</sup> H. Collins, “Theories of Rights as Justifications” in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011), 137.

and underpins its strategy to “turn the EU into a smart, sustainable and inclusive economy delivering high levels of employment, productivity and social cohesion.”<sup>26</sup>

The ‘law of the labour market’ account claims to be *descriptively accurate* (for example, with an emphasis on competitiveness, flexibility, managerial adaptability and ‘partnership’ in policy circles as a means of enhancing the efficiency and functioning of the labour market) and *normatively salient* (as an instrument to evaluate the deficiencies in the law so that arguments about reforming its extent, content and scope can be made) in terms of advancing a critical agenda for the discipline. The basic argument is that social rights conferred by labour laws are, and ought to be, market-constituting and serve to set the basic rules of the game for a well-functioning and efficient labour market. However, this approach has also been subject to criticism most notably by Dukes<sup>27</sup>, Streeck<sup>28</sup> and Tucker.<sup>29</sup> One objection is that there is an inherent danger in prioritising the economic over the social as the predominant unifying narrative or rationale for the study of labour law, since such an approach serves to underplay the purchase of the claims for particular labour laws and rights. There are limitations on the normativity of the law of the labour market narrative inasmuch as its internal grammar naturally imposes restrictions on the scope of the subject.<sup>30</sup> This can be explained on the basis that, within this justificatory framework, the ultimate question when evaluating a proposed labour law reform is whether it will lead to greater efficiency, productivity and a better functioning labour market, rather than whether it reduces the vulnerability, domination or subordination of, or disadvantages experienced by, workers. In addition, the law of the labour market model operates to detach the connection between labour law and politics, as well as labour law and democracy/democratic control of the adverse effects on workers of ever-expanding markets. It is also unable to offer up

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<sup>26</sup> European Commission, Europe 2020, COM(2010)2020 final, p. 6.

<sup>27</sup> Ibid., 97 and 105-115. Dukes proposes the labour constitution as an alternative framework for analysis, whilst pointing to the political and democratic deficits in the ‘law of the labour market’ account of labour law.

<sup>28</sup> W. Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy* (Oxford, OUP, 2009).

<sup>29</sup> E. Tucker, ‘Renorming Labour Law: Can We Escape Labour Law’s Recurring Regulatory Dilemma’ (2010) 39 *Industrial Law Journal* 99.

<sup>30</sup> See R. Dukes, *The Labour Constitution* (Oxford, OUP, 2015) 114-115.

justifications for particular areas of labour law, particularly collective labour laws, industrial action, collective representation, collective bargaining, etc.,<sup>31</sup> where there is no dispute between neoclassical and new institutional economists regarding the extent to which such laws have the effect of restraining, rather than constituting or complementing, a well-functioning labour market,<sup>32</sup> i.e. where certain areas of labour law are clearly not market-constituting.

Overall, then, each of the three main justifications for labour law grounded in the ‘social justice’ or ‘efficiency’ variables, are vulnerable to the critique that they no longer fully describe the role and scope of labour law, nor do they capture how such laws ought to be conceived and how far they ought to extend. Neither do they offer an all-encompassing explanation for labour law’s interference in contemporary employment relationships - although the extent to which this is a reasonable and proper criterion for the identification of a sufficient or adequate theory of justification of labour laws must also be questioned. Furthermore, despite regular regulatory interference in the employment relationship by the legislature, the judiciary and supranational bodies (such as the European Union), competition and flexibility amongst workers has increased, atypical and precarious forms of labour are on the rise while the strength of organised labour has declined and is continuing to do so. Inequality of bargaining power has thus increased. As a result, labour law in most developed economies finds itself “in a conceptual and normative crisis” and unable to respond to “vertical inequality [which has] increased to levels not seen since before the Second World War in the dominant developed countries.”<sup>33</sup> For this reason, this chapter suggests looking beyond socio-legal and economic justifications for the discipline and borrows from civic

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<sup>31</sup> Deakin himself would seem to recognise the problem here: S. Deakin, ‘A New Paradigm for Labour Law? A Review of C. Arup, P. Gahan, J. Howe, R. Johnstone, R. Mitchell, A. O’Donnell (eds.), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Sydney, The Federation Press, 2006)’ (2007) 31 *Melbourne University Law Review* 1161, 1172-1173.

<sup>32</sup> See R. Dukes, *The Labour Constitution* (Oxford, OUP, 2015) 114.

<sup>33</sup> J. Fudge, “Labour as a ‘Fictive Commodity’” in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 124. See also T. Piketty, *Capital in the Twenty-First Century* (Cambridge, USA, Harvard University Press, 2014).

republican concepts of 'social justice' and 'domination' which are grounded in political philosophy, to consider whether such concepts can provide an alternative justificatory framework for labour laws. The purpose of this exercise is to test the purchase of this model as a supplementary basis for labour laws, rather than to attempt to cast doubt on, or critique, other key accounts for the subject: as such, this chapter does not claim that non-domination provides an exhaustive account as a univocal theory or justification of labour law or that it ought to be treated as the exclusive value that the field ought to promote. Instead, the argument is presented within a spirit favouring a pluralistic scheme and the co-existence of different goals for the discipline, each of which may be brought out of the kitbag to justify different labour laws according to the context.

### 3. The position of domination theory in contemporary political theory and its advantages over competing philosophies

#### *a. Introduction*

In a prescient essay, Collins identified how labour law study and theory has largely been deaf to developments in the field of political philosophy.<sup>34</sup> Taking inspiration from Collins's article, the ensuing narrative in this chapter is primarily intended as a modest attempt to fill such a gap in the labour law literature. In particular, the paper takes its cue from the domination stream of civic republican school thought in contemporary political philosophy, whose more notable adherents include Pettit,<sup>35</sup> Skinner<sup>36</sup> and Lovett.<sup>37</sup> This contemporary political and

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<sup>34</sup> H. Collins, 'The Productive Disintegration of Labour Law' (1997) 26 *Industrial Law Journal* 295, 297. Of course, there are notable exceptions, e.g. Mantouvalou and Collins and Bogg and Estlund: V. Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Places' (2008) 71 *Modern Law Review* 912, 925-926 and 938-939, H. Collins and V. Mantouvalou, 'Redfearn v UK: Political Association and Dismissal' (2013) 76 *Modern Law Review* 909, 922-923, and A. Bogg and C. Estlund, 'Freedom of Association and the Right to Contest: Getting Back to Basics' in A. Bogg and T. Novitz (eds.), *Voices at Work* (Oxford, OUP, 2014) 141, 142-143 and 151-162.

<sup>35</sup> P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, OUP, 1997) and P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy*, (Cambridge, CUP, 2012).

<sup>36</sup> Q. Skinner, *Liberty before Liberalism* (Cambridge, CUP, 1998).

<sup>37</sup> F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010).

social philosophy rooted in the civic republican tradition claims to offer up an alternative conception of freedom and social justice, with the latter defined as ‘how well members should compare with one another within the basic structure of the society.’<sup>38</sup> In this section, the relationship between such civic republican thinking, ‘social justice’, ‘freedom’ and ‘non-domination’ will be analysed, as will the connection between the latter and its capacity to be harnessed to further and justify – as well as provide a *descriptively contoured account* of and *normative programme* for – labour law. The subsequent sub-sections expound both the theories of Pettit and Lovett in more detail.

#### *b. Civic republicanism and ‘freedom’: Pettit*

To understand the concept of ‘domination’, we must first provide a sketch of the elementary attributes of the civic republican thread of political thought. Traditional civic republican philosophy provides an account of the concept of ‘freedom’ within the context of a framework that seeks to address questions of the legitimacy and justice of a social and political order or system.<sup>39</sup> Writing within that scheme, Pettit’s understanding of ‘freedom’ contains three main ideas<sup>40</sup> which are of relevance. First, the state must guarantee the equal freedom of its citizens. Freedom, in this context, is understood as ‘non-domination’; meaning that citizens should be able to act as free, ‘undominated’ – not being subject to the potentially harmful power of the state or other citizens – in the sphere of fundamental liberties. According to Pettit, “‘freedom as non-domination’ requires not merely non-interference in individuals’ life choices (including their contractual choices); it requires the ability to contest the decisions of others, both public and private actors, who wield power over one’s life and

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<sup>38</sup> P. Pettit, ‘Justice’ in D. Sobel, P. Vallentyne and S. Wall (eds), *Oxford Studies in Political Philosophy*, Volume I (Oxford, OUP, 2015) 9. Lovett defines a conception of social justice as ‘an account of what sort of basic structure would be best, from the point of view of justice... that [is] in respecting and upholding its institutions and practices in the process of living out their lives, people would, in the traditional expression, be giving each their due...’: F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 158.

<sup>39</sup> See P. Pettit, “Legitimacy and Justice in Republican Perspective” (2012) 65 *Current Legal Problems* 59, 60-65.

<sup>40</sup> Ibid, 72-74. For a more detailed discussion of these ideas see P. Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy*, (Cambridge, CUP, 2012).

livelihood.”<sup>41</sup> As such, an ‘unfree’ relationship, political, social or otherwise, is one characterised by domination, and it is irrelevant whether ‘interference’ from outside is or is not being exercised over one’s liberty. For example, in the case of the benevolent master and his slave, notwithstanding the good behaviour and non-interference of the master, the slave remains subject to the domination of the master, and as such, is ‘unfree’. Meanwhile, it is equally possible for a ‘free’ individual to be subject to routine external interference without domination, e.g. the borrower bound by crippling financial covenants in a loan agreement it freely committed itself to with a lender.<sup>42</sup>

This leads us on to the second idea underpinning the domination strand of civic republican thought: the state can best guarantee the freedom of its citizens from domination if it is subject to certain constitutional constraints usually associated with a mixed constitution. Such a constitution must guarantee a rule of law which provides for the equality of its citizens and a separation of powers. Only if both of these aspects are fulfilled can citizens be free from domination by the state and protected from domination by other citizens. Finally, the republication account of ‘freedom’ prescribes that citizens must be able to hold the state to account under such a constitution – a ‘contestatory citizenry’<sup>43</sup> – in order to ensure that a government promotes freedom and equality amongst its citizens without itself becoming dominant. One of the normative propositions for the concretization of this ‘contestatory citizenry’ is to co-ordinate vertical state-citizen *and* civic institutions and horizontal social relationships (such as employer and employee) around deliberative democratic principles or principles of participative communitarianism.<sup>44</sup> This involves affording a measure of

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<sup>41</sup>A. Bogg and C. Estlund, “Freedom of Association and the Right to Contest: Getting Back to Basics”, in A. Bogg and T. Novitz (eds.) *Voices at Work: Continuity and Change in the Common Law World* (Oxford, OUP, 2014) 142.

<sup>42</sup> See P. Pettit, “Legitimacy and Justice in Republican Perspective” (2012) 65 *Current Legal Problems* 59, 73-74 and P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, OUP, 1999) 51.

<sup>43</sup> A. Bogg and C. Estlund, “Freedom of Association and the Right to Contest: Getting Back to Basics”, in A. Bogg and T. Novitz (eds.) *Voices at Work: Continuity and Change in the Common Law World* (Oxford, OUP, 2014) 143-149.

<sup>44</sup> See D. Oliver, *Common Values and the Public-Private Divide* (London, Butterworths, 1999) 5-6 and M. Freedland and N. Kountouris, “Common Law and Voice” in A. Bogg and T. Novitz, (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford, OUP, 2014) 358-359.



procedural protections to citizens and parties in private social relationships such as workers in the context of workplace decisions taken by employers pursuant to the managerial prerogative, Pettit explicitly recognising employment as a relationship characterised by domination.<sup>45</sup> Building on these ideas, republican theories require a state not only to establish a proper balance between the differential claims of citizens within its social order but also to “[publicly] entrench... [people] in their enjoyment [and exercise] of... basic liberties”<sup>46</sup> so that they can enjoy freedom from domination. When freedom as non-domination is assured, according to Pettit, citizens can “look [each] other... in the eye without reason for the fear or deference that a power of interference might inspire; they can walk tall and assume the public status ... of being equal in this regard with the best.”<sup>47</sup> Seen from this perspective, under Pettit’s scheme, a legitimate social order guaranteeing “freedom” ought to extend to private, horizontal relations and would confer workers with certain procedural freedoms, empowering them to combine together in solidarity so that they can participate in decision-making and contest workplace decisions affecting them via discussion and consultation with management. As such, a necessary precursor of any normatively legitimate social system is the promotion of voice and freedom of association via collective labour law,<sup>48</sup> as well as collective bargaining law,<sup>49</sup> and laws recognising industrial action.<sup>50</sup> Only such a system can truly be legitimate in terms of Pettit’s normative framework, relying as it does on procedurally fair precepts which confer a say in favour of workers, e.g. by affording workers the freedom to ‘turn up’ the bargaining power on their side of the worker-management

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<sup>45</sup> P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, OUP, 1999) 22, P. Pettit, ‘Freedom in the Market’ (2006) 5 *Politics, Philosophy and Economics* 131, 142 and P. Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy*, (Cambridge, CUP, 2012) 99 and 115-116.

<sup>46</sup> P. Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy*, (Cambridge, CUP, 2012) 299.

<sup>47</sup> *Ibid.* 114-5.

<sup>48</sup> *Ibid.* 111.

<sup>49</sup> For the links between freedom of association, collective labour law, procedural fairness/justice and Pettit’s conception of freedom as non-domination, see A. Bogg and C. Estlund, “Freedom of Association and the Right to Contest: Getting Back to Basics”, in A. Bogg and T. Novitz (eds.) *Voices at Work: Continuity and Change in the Common Law World* (Oxford, OUP, 2014) 142-162.

<sup>50</sup> P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, OUP, 1999) 142-143.

equation,<sup>51</sup> to restructure it in the direction of the worker and can be brought to bear on the substance of the terms of their contract through bilateral negotiations.

*c. Lovett's theory of social justice as 'non-domination'*

Non-domination is presented as a theory of *liberty* by Pettit, but as a theory of *social justice* by Lovett.<sup>52</sup> Pettit's theory of non-domination is primarily concerned with freedom in terms of the *absence of domination* (as opposed to the *absence of interference* which pertains in the mainstream account of 'negative liberty' propounded by both liberal-contractualists and neoliberals), participatory democracy and the establishment of procedural rights in (i) vertical relations between the individual and the State, e.g. democratic control and the right of individuals to participate in political decisions and (ii) horizontal private relationships in order to embed procedural entitlements, such as those secured through the process of procedural fairness in the case of unfair dismissal regulation in labour law. It can be contrasted with Lovett's conception of a *just* social system. In Lovett's scheme, *social justice* is treated as non-domination, which is concerned with an evaluation as to whether *the substance* of a horizontal social relationship and the terms on which it is founded are structured in a way that is fair, desirable or justifiable.

*d. Lovett's theory of 'domination': the essential elements*

According to Lovett, a person or group is 'subject to domination to the extent that [he/she/]they are dependent on a social relationship in which some other person or group wields arbitrary power over [him/her] them.'<sup>53</sup> He then sets out three variables which influence the extent to which a particular social relationship, such as employer and employee, can be characterised as one grounded in domination. In shorthand, we can refer to these

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<sup>51</sup> B. Langille, 'Labour Law's Back Pages' in G. Davidov and B. Langille (eds), *Boundaries and Frontiers of Labour Law* (Oxford, Hart, 2006) 20.

<sup>52</sup> See F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 9 and 173.

<sup>53</sup> *Ibid.* 119.

three elements as ‘dependency’, ‘power imbalance’ and ‘arbitrariness’. Starting first with ‘dependency’, party A must be dependent on his/her social relationship with party B, which will often be financial in nature, but not necessarily always so. The greater the displacement cost to A involved in exiting the relationship,<sup>54</sup> the higher A’s dependency. The cost of exit/level of dependency is calculated in terms of the degree to which A’s engagement in the social relationship with B is involuntary, which is equated to the net expected costs of exit, i.e. (1) the overall value of the existing position judged from the employee’s viewpoint, less (2) the overall value of the next best job in the labour market, plus (3) the transaction costs and risks of moving from the existing position to the alternative one.<sup>55</sup> Seen from this perspective, the ‘typically high displacement’,<sup>56</sup> financial, emotional and other costs of the individual employee exiting the social relationship operate as a major deterrent from him/her doing so. In this regard, the notion of dependency also covers well-paid employees<sup>57</sup> and clearly differs from the element of subordination that inheres in the employment relationship. What is also clear is that the costs of exit borne by the employee will routinely be of a higher order of magnitude than the replacement costs incurred by the employer. This phenomenon is attributable to the elasticity of the labour supply in the market whereby supply inevitably outstrips demand.

The second important factor is the requirement for a ‘power imbalance’,<sup>58</sup> in the sense that B must have greater coercive social or market power over A than A has over B.<sup>59</sup> The greater the imbalance in social power, the greater the extent of the domination. The degree of social power wielded by B over A is measured by the degree to which B can induce or encourage a

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<sup>54</sup> Ibid. 39-40.

<sup>55</sup> Ibid. 39 and 50.

<sup>56</sup> M. Moore, “Reconstituting Labour Market Freedom: Corporate Governance and Collective Worker Counterbalance” (2014) 43 *Industrial Law Journal* 398, 416 and M. Moore, *Corporate Governance in the Shadow of the State* (Oxford, Hart, 2013) 45-49.

<sup>57</sup> See C. Laborde, ‘Republicanism’ in M. Freeden, L. T. Sargent and M. Stears, *The Oxford Handbook of Political Ideologies* (Oxford, OUP, 2013) 527.

<sup>58</sup> The account of power advanced by Lovett is based on Hobbes, Weber and Foucault, but not Gramsci, on which, see F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 67-74, 74-78 and 83.

<sup>59</sup> Ibid. 74-78.

difference in A's level of effort, by issuing credible threats or offers.<sup>60</sup> This idea of 'power imbalance' is similar, albeit not quite identical, to the notion of 'subordination' evoked by the UK Supreme Court in *Jivraj v Hishwani*<sup>61</sup> and *Bates van Winkelhof v Clyde & Co LLP*.<sup>62</sup> In other words, the individual A must be able to show as sociological fact that he/she is in a hierarchical relationship with B the hirer of his labour in the sense of some subservience to the direction of B that is attributable to a mismatch in power relations, with the potential for A's dignity, liberty, home and private life and sense of self-esteem/respect to be overridden by B. It is this social, market or coercive power of the employer to direct the employee which is so important and captured in the notion of the employer's managerial prerogative.

The final variable is 'arbitrariness', in the sense that the features of A and B's social relationship are such that B has the ability to wield arbitrary power over A. Such power will be 'arbitrary' to the extent that its 'potential exercise is not *externally* constrained by *effective* [laws, policies, conventions,] rules, procedures, or goals that are common knowledge to all persons or groups concerned.'<sup>63</sup> In other words, in the absence of external legal measures and effective constraints which operate to restrict B's exercise of power or prerogative, B is said to wield 'arbitrary' power over A. To this end, B enjoys a social power which it can exercise according to its 'will or pleasure' over A without any effective external limits, i.e. that decisions may be taken or not taken for no, any, or a bad, reason.<sup>64</sup> Lovett specifically identifies employees<sup>65</sup> as being subject to an arbitrary social power imbalance at the hands of their employers.<sup>66</sup>

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<sup>60</sup> F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 78-79.

<sup>61</sup> [2011] 1 WLR 1872.

<sup>62</sup> [2014] 1WLR 2047, 2058G-2059B per Baroness Hale.

<sup>63</sup> F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 96-97.

<sup>64</sup> *Ibid.* 96.

<sup>65</sup> As does Pettit in P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, OUP, 1999) 22, P. Pettit, 'Freedom in the Market' (2006) 5 *Politics, Philosophy and Economics* 131, 142 and P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy*, (Cambridge, CUP, 2012) 99 and 115-116.

<sup>66</sup> F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 100. Lovett cites the employment-at-will doctrine in US Labor Law. To the extent that the 'unrestricted reasonable notice rule' was introduced in the 19<sup>th</sup> century in English law to afford employees a measure of common law protection, it represents only a limited dilution of the legal restrictions imposed on the arbitrary social power of employers to fire their employees.

Finally, it should be stressed that the higher the aggregate of (1) the dependency of A on B, (2) the power imbalance favouring B, and (3) the arbitrariness exercised by B, the greater the level of domination inherent in the social relationship between A and B. Arguably, it is the addition of the ‘arbitrariness’ and dependency factors that distinguish ‘domination’ from the traditional ‘inequality of bargaining power’ justification for legal intervention.

*e. The similarities and divergences between Pettit’s and Lovett’s accounts of domination*

Both Pettit’s and Lovett’s models form a key part of the domination thread of civic republican theory.<sup>67</sup> Alongside the lexicon of “domination”, what they both share in common is the rejection of structuralism. Unshackled from the constraints of philosophy, many people would agree with the idea that economic, social or political institutions such as the labour market or the structure of society can function in a way which dominates individuals. But Pettit and Lovett reject this. Instead, they recognise a conception of domination in terms of interpersonal relationships so that in an agentless context, “domination” would be impossible. In this way, a bilateral relationship is required for both Pettit and Lovett before any domination can arise. But where they part company from each other is in three key areas. The first main distinction that can be drawn between them is precisely the measure that they use to calculate the reduction or elimination of domination, namely that Pettit’s model is designed to elicit “freedom”, whereas Lovett’s is concerned with a socially just order. Secondly, the minutiae of the criteria for the establishment of “domination” differ in terms

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<sup>67</sup> Another strand of the civic republican philosophy is workplace or labour republicanism, with which we are not concerned here: for details, see Gourevitch (see A. Gourevitch, ‘Labor and republican liberty’ (2011) 18 (3) *Constellations* 431–54 and A. Gourevitch, ‘Labor republicanism and the transformation of work’ (2013) 41 (4) *Political Theory* 591–617), Anderson (see E. Anderson, ‘Equality and freedom in the workplace: recovering republican insights’ (2015) 31 (2) *Social Philosophy and Policy* 48–69 and *Private Government: How Employers Rule Our Lives (and Why We Don’t Talk about It)* (Princeton, New Jersey, Princeton University Press, 2017), Hsieh (see N.-H. Hsieh, ‘Rawlsian justice and workplace republicanism’ (2005) 31(1) *Social Theory and Practice* 115–42), González-Ricoy (see I. González-Ricoy, ‘The republican case for workplace democracy’ (2014) 40(2) *Social Theory and Practice*, 232–54) and Schuppert (see F. Schuppert, ‘Being equal: analysing the nature of social egalitarian relationships’ in C. Fourie, F. Schuppert, and I. Wallimann-Helmer, eds. *Social Equality: on what it means to be equals*. Oxford: Oxford University Press, 2015, 107–25).

of their two schemes. For example, Pettit's idea of arbitrary power is slightly different from that of Lovett. Moreover, Pettit does not include "dependency" as a factor that is necessary for a relationship to be characterised by "domination", whereas Lovett does.<sup>68</sup> The third way in which both models deviate concerns the normative prescriptions that they put forward for the reduction of domination. Lovett's agenda for the diminution of domination involves the establishment of a universal basic income for all individuals (including workers) which would incentivise the generation of a frictionless and ease of exit from one's job, and as such adheres much more faithfully to the rejection of structuralism. However, alongside individual worker's rights to challenge at-will dismissals, Pettit's scheme embraces measures operating at the collective level which confer rights on bodies such as trade unions. It is challenging to square the latter with the anti-structuralist account to the extent that such laws do not act directly on bilateral relationships tainted by domination to drive down the relevant dependency and arbitrary power dynamics. If anything, they only do so indirectly, but this jars with a relational conception of domination which can only justify laws that directly subject a particular relationship to interference.

*f. The advantages of Pettit's and Lovett's approaches over liberal theories*

Once abstracted from civic republicanism, Lovett's theory of social justice as non-domination – defined as 'societies are just to the extent that their basic structure is organized so as to minimize the expected sum total domination experienced by their members, counting the domination of each member equally'<sup>69</sup> provides a highly persuasive political and social account of justice designed to govern horizontal relations between 'the individual citizens of

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<sup>68</sup> Contrast F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 9, 119-123 and chapters 2 to 4 with P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, OUP, 1999) 52-56, P. Pettit, "Freedom in the Market" (2006) 5 *Politics, Philosophy and Economics* 131, 138 and P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy*, (Cambridge, CUP, 2012) chapter 1. However, Lovett's reform agenda to achieve non-domination is arguably overly restrained.

<sup>69</sup> Ibid. 159. This enables us to distinguish social justice as non-domination from utilitarianism, i.e. social justice as the maximization of happiness, or efficiency-based justifications of social justice which seek to maximize overall efficiency: Ibid, 160.

a state, whether individually or in groups'.<sup>70</sup> As labour laws are an integral component of a socially just system, they form a subset of any system of social justice, alongside social security/welfare law, family law and housing law. Herein lies the relevance of Lovett's non-domination based conception of social justice to labour laws. In particular, the major attraction of adapting Pettit's or Lovett's non-domination strand of civic republicanism as a political grounding for labour laws is the extent to which it addresses some of the weaknesses in the high profile liberal-contractualist stream of political thought. The liberal-contractualism or modern liberalism of Rousseau, Locke, Kant, Mill and Rawls which supplanted the republican mode of analysis in the early modern period is now in the mainstream of political and social thought, but struggles to account for policies whose objective is to combat the exploitation of labour, inequality and poverty in the private sphere.<sup>71</sup> Since liberals are in the habit of focussing on arranging the essential elements of a society's structures in a way that is just, they tend to overlook the private arena. Therefore, it is not always clear how policies designed to achieve distributive justice and equality can fit within a framework of individual liberalism.<sup>72</sup> For example, liberals are generally comfortable with employees being dependent on their employers for a living so long as the basic social and political institutions and structures of the society are just and do not interfere in the liberty of employees, and the market is operating effectively to maximise the level of wages, salaries, and economic growth all round.<sup>73</sup>

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<sup>70</sup> P. Pettit, 'Justice' in D. Sobel, P. Vallentyne and S. Wall (eds), *Oxford Studies in Political Philosophy*, Volume I (Oxford, OUP, 2015) 11.

<sup>71</sup> For other differences between the liberal-contractualist conception of social justice and that of civic republicans, see F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 169.

<sup>72</sup> See F. Lovett, 'Domination and Distributive Justice' (2009) 71 *Journal of Politics* 817, 818, W. Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford, OUP, 1990) 94-96 and 102-161, D. Enoch, 'Against Public Reason' in D. Sobel, P. Vallentyne and S. Wall (eds), *Oxford Studies in Political Philosophy*, Volume I (Oxford, OUP, 2015) 123-124, F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 7, A. Ryan, 'Liberalism' in R. E. Goodin, P. Pettit and T. Pogge (eds.), *A Companion to Contemporary Political Philosophy*, 2<sup>nd</sup> edn, Vol. I, (Oxford, Blackwell Publishing, 2007) 364-365 and P. Pettit, 'Analytical Philosophy' in R. E. Goodin, P. Pettit and T. Pogge (eds.), *A Companion to Contemporary Political Philosophy*, 2<sup>nd</sup> edn, Vol. I, (Oxford, Blackwell Publishing, 2007) 14-15.

<sup>73</sup> See further C. Laborde, 'Republicanism' in M. Freeden, L. T. Sargent and M. Stears, *The Oxford Handbook of Political Ideologies* (Oxford, OUP, 2013) 526.

Part of the explanation for the poverty of liberal contractualism in this regard is that adherents of this approach define liberty in the negative terms associated with eminent thinkers such as Hobbes,<sup>74</sup> Bentham,<sup>75</sup> Mill<sup>76</sup> and Berlin.<sup>77</sup> This compelling account of liberty embraces the received notion that liberty should be defined as freedom from interference, subject to those exceptional circumstances where interference with an individual's freedom is necessary to reduce the harm done to others or to prevent the deprivation of the liberty of others.<sup>78</sup> However, at the very same time as modern liberals promote such a conception of negative liberty, they also advocate policies which are designed to 'expand the freedom' of individuals by ensuring that the state intervenes at a vertical level to introduce laws 'emancipat[ing] individuals from the fear of [poverty,] hunger, unemployment, ill health and a miserable old age...'<sup>79</sup> As demonstrated by Collins, the relationship established by the contract of employment is fundamentally illiberal insofar as it interferes in the freedom of employees by all manner of common law rules<sup>80</sup> and via its inherent authority/power relation dynamic,<sup>81</sup> thus embedding the subordination of employees to that of the employer.<sup>82</sup> As such, although liberal-contractualists advocate laws to expand the freedom of employees, the catch-22 for this strand of liberalism is that any legal measures designed to reduce the subordination of the employee to the employer necessarily impinge on the freedom of the employer. These laws will inevitably amount to state interference and as such, infringe and curtail the negative liberty of employers. Hence, liberal-contractualism struggles to account

<sup>74</sup> T. Hobbes, *Leviathan*, R. Tuck (ed) (Cambridge, Cambridge University Press, 1991) chapter 21 at page 146.

<sup>75</sup> *The Works of Jeremy Bentham*, John Bowring, (ed), (London, 1838-1843); Reprinted New York, 1962.

<sup>76</sup> J. S. Mill, *Principles of Political Economy with some of their Applications to Social Philosophy* (1994) [1848], Book V, Chapter XI, "On the Ground and Limits of the *Laissez-Fair* or Non-Interference Principle," p. 334.

<sup>77</sup> I. Berlin, "Two Concepts of Liberty" in *Isaiah Berlin, Liberty, Incorporating Four Essays on Liberty*, H. Hardy (ed) (Oxford: Oxford University Press, 2002) 166-181.

<sup>78</sup> See F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 152-153.

<sup>79</sup> A. Ryan, 'Liberalism' in R. E. Goodin, P. Pettit and T. Pogge (eds.), *A Companion to Contemporary Political Philosophy*, 2<sup>nd</sup> edn, Vol. I, (Oxford, Blackwell Publishing, 2007) 366-368.

<sup>80</sup> For example, the implied terms enjoining employees to obey reasonable instructions and orders of the employer and obliging them to be loyal.

<sup>81</sup> H. Simon, 'A Formal Theory of the Employment Relationship' (1951) 19 *Econometrica* 293, 293-4. This authority/power relation can be partly attributed to the incomplete nature of the contract of employment, on which, see W. Brown and D. Rea, 'The Changing Nature of the Employment Contract' (1995) 42 *Scottish Journal of Political Economy* 363, 363-4.

<sup>82</sup> See H. Collins, 'Labour is not an Instrument: Is the Contract of Employment Compatible with Liberalism?' *infra*.



for progressive liberal policies. Therein lies the paradox and internal contradiction in the position of the liberal-contractualist who, one would think, ought to be naturally unsympathetic or at the very least, indisposed, to such policy prescriptions.

Civic republicans take issue with this non-interference-based conception of liberty.<sup>83</sup> Instead, as we saw when discussing Pettit's scheme above, they define liberty as the *absence of domination*.<sup>84</sup> In essence, if a state policy is, or suite of laws are, introduced that serves to reduce the dependency of an individual A on an imbalanced social relationship with another B, or limit the extent of the arbitrary discretion or power that B wields over A, then the domination of A will be constrained by that policy or law. In this way, aggregate domination is reduced, and the policy measures or laws that have been enacted are acting in a manner that is constitutive, rather than destructive, of freedom.<sup>85</sup> As such, civic republicans, unlike neoliberals and some liberal-contractualists, are completely comfortable with the idea of being 'free under the law'.<sup>86</sup> Implicit in this idea of interference 'under the law' is the recognition that although there has been a reduction in the negative liberty of individuals or legal persons such as B, the extent of the increase in the state's domination over them is negligible to limited, and the sum total of freedom is enhanced and expanded overall inasmuch as such intervention results in a diminution of the level of dependency experienced by A, the power imbalance wielded by B over A, or the degree of arbitrariness enjoyed by B. Here, we can see a *prima facie* civic republican justification for some mandatory labour laws – such as discrimination/equality laws, wrongful or unfair dismissal/discharge laws and redistributive laws<sup>87</sup> such as national minimum wages – which, owing to the fact that they directly tone down the dependency of the employee or arbitrary power imbalance, curtail the

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<sup>83</sup> See F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 153-154.

<sup>84</sup> Ibid. 155 and C. Laborde, 'Republicanism' in M. Freeden, L. T. Sargent and M. Stears, *The Oxford Handbook of Political Ideologies* (Oxford, OUP, 2013) 518-519.

<sup>85</sup> F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 156.

<sup>86</sup> C. Laborde, 'Republicanism' in M. Freeden, L. T. Sargent and M. Stears, *The Oxford Handbook of Political Ideologies* (Oxford, OUP, 2013) 523.

<sup>87</sup> For the relationship between 'non-domination' and distributive justice, see F. Lovett, 'Domination and Distributive Justice' (2009) 71 *Journal of Politics* 817.

sphere of activity and range of choices open to employers, and which otherwise might cause liberals serious misgivings. This prescription reflects why civic republicanism places emphasis on substantive relational rights and social concerns addressed by labour laws<sup>88</sup> that transcend mere individualistic considerations.

The import of the concept of ‘justice as non-domination’ viewed specifically through the lens of labour law lies primarily in its impact on the *substantive fairness* of the bargain concluded between management and an employee. To the extent that substantive interferences prescribed by law rupture the freedom of contract doctrine, civic republicans ought to be relaxed about this, so long as the domination to which the employee is subject is diminished and the employer’s vertical position vis-a-vis the state is not so radically altered as to give rise to a relationship of domination. In this way, Lovett’s framework can account for the conferral of substantive rights in favour of legal persons in employment relationships. For example, redistributive policies can be supported on the basis of the civic republican conception of labour laws as constitutive of social justice.

#### 4. Descriptive accuracy of non-domination theory in terms of labour law

To be useful as a justificatory pillar for labour laws, the conception of social justice as ‘non-domination’ must be descriptively accurate. That is to say that one must evaluate the degree to which the account of ‘social justice as non-domination’ presents an accurate descriptive account of (1) the range of individuals engaged in the personal provision of work that are caught by the protective coverage of labour laws, and (2) the disparate topics contained within the regulatory sweep of labour laws. This raises the question whether it can justifiably be claimed that each of the policy areas comprised within what we traditionally understand as the field of ‘labour law’ can be understood as rules or principles intended to directly drive

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<sup>88</sup> R. Dagger, “Neo-republicanism and the civic economy” (2006) 5 *Politics, Philosophy and Economics* 151, 155 and 162.

down employee dependency, or the extent of the arbitrary imbalance in power inherent within the employment relationship?<sup>89</sup> Alternatively, are they motivated by some other policy choice or principle?

We first turn to examine whether the non-domination framework advanced by Lovett can explain the range of persons personally providing work that fall within the purview of employment laws. To answer this question, we must apply the three variables identified by Lovett at 3d. above and test their descriptive accuracy against the standard employment relationship and other personal work relationships regulated by labour law. In other words, to what extent are each of these three elements duly reflected in employment and other personal work relationships? As such, if we examine the employment relationship in the abstract (and a jurisdiction-neutral context) for the presence of the above three elements, we find that they are generally in place. The employer is in the position to exercise social and market power to co-ordinate the activities of the employee in the workplace, which in the absence of law, would be subject to no effective or external legal constraints. This translates into the subordination of the employee to the employer that is essential to that relationship. The employee is also dependent on the employer inasmuch as the exit costs are sufficiently high to lock the employee into the working relationship because of the supply and demand mechanics of the labour market. Finally, the managerial prerogative that inheres in the contract of employment serves to afford the employer a degree of arbitrary discretion that operates without outside effectual checks. To that extent, if we are to attempt to formulate a *descriptively useful* account of, as well as a justificatory framework for, UK labour law, we can think of it as a body of rules and principles whose objective is to minimise the degree of domination exerted by the employer over the employee within the context of the employment relationship. This is achieved by crafting rules which seek to (1) subject the employer's power of direction and co-ordination, as well the degree of subordination of the employee, to external and effective controls, (2) level down the degree of dependency of the

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<sup>89</sup> F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 120.

employee on the employer by modifying the operation of the labour market, and/or (3) adjust the level of arbitrary discretion enjoyed by the employer by subjecting it to constraints. These rules function at a *substantive* level. As such, a 'socially just' system of individual labour laws can be considered as one which seeks to offset the imbalance of social, coercive or market power inherent within the relationship by conferring various rights on employees through intervention in the substance of the terms and conditions of the employment contract.

Of course, this evaluation only takes us so far. It simply asks whether individuals who are 'employees' have a relationship with their employers that can be characterised by domination. However, what of those persons providing a personal service to an employing entity who are not employees but sufficiently semi-dependent on that employing entity to warrant their categorisation as lying somewhere between the two extremes of the contract of employment and the commercial contract for services? For example, some jurisdictions like the UK specifically recognise intermediate work categories: UK employment law would identify such persons as 'workers'<sup>90</sup> or persons engaged on the basis of a 'contract personally to do work'.<sup>91</sup> Persons falling inside these categories are entitled to some employment protection, albeit not as extensive in scope as that enjoyed by employees. The question is whether these intermediate personal work relationships can be cast as being exemplified by domination, to which the obvious response is 'yes', when their attributes are evaluated in terms of the three criteria outlined at 3d above, namely (1) dependency, (2) power imbalance and (3) arbitrariness. Lovett himself recognises<sup>92</sup> that domination presents itself in varying degrees and social working relationships can therefore be discriminated against depending on the degree to which each of these three factors are present in a particular relationship.

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<sup>90</sup> Section 230(3)(b) of the Employment Rights Act 1996, section 296(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992, section 54(3) of the National Minimum Wage Act 1998, section 88 of the Pensions Act 2008, regulation 2(1) of the Working Time Regulations 1998 (SI 1998/1833), and regulation 1(2) of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551).

<sup>91</sup> Section 83(2)(a) of the Equality Act 2010.

<sup>92</sup> F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010) 120-1.

Once it is clear that the persons covered by labour law protections can be explained in terms of the domination-based conception, we must then ask to what extent the concept accurately depicts the variety and range of topics consisting within the field of labour law. UK labour law will be used as a proxy for the purposes of this analysis and for reasons of space constraints, only some of the more obvious topics included within the compass of labour laws will be discussed. For example, UK labour law covers a broad range of topics such as national minimum wage laws, equal pay laws, and working time regulations. National minimum wage laws prescribe a standard minimum hourly rate for wages throughout the UK, the equal pay laws ensure parity of pay for equal work irrespective of gender and the regulations governing working time govern the conditions of the workplace, annual leave, holiday pay and the frequency of rest breaks throughout the worker's day and working week. Each of these laws have in common the fact that they limit the degree to which employers can set the market rate for wages, or dictate the working conditions of employees, which would otherwise be adopted by the market. Likewise, the term of mutual trust and confidence that is implied by the common law in the UK to regulate the terms of the employment contract is partly motivated by the desire to subject the ingrained arbitrary decision-making power of the employer to certain standards. Of course, a significant and pressing question is how and whether – in the absence of a detailed explanation – it is possible to draw a sufficiently robust connection between civic republican theory and specific labour laws such as the national minimum wage, equal pay laws, the regulation of working time and the trust and confidence implied term. Whilst this issue of how we get from the abstract to the particular is a matter of considerable moment, only a brief sketch of a response is offered here. One plausible way to establish such a link is to focus on the impact of those laws and then assess whether their effect is one which chimes with the domination-based narrative of civic republican political theory. By way of illustration, there is a *prima facie* argument that the aforementioned employment laws tie in with the conception of 'justice as non-domination' to the extent that they minimise the opportunities available to an employer to exercise arbitrary power in what is an inherently imbalanced social relationship and where the weaker party, i.e. the employee,

is highly dependent on that relationship. As such, the modest claim can be made that the particular policy areas of minimum wage, equal pay and working time regulation and the implied term of mutual trust and confidence that are comprised within UK labour law can be understood as rules, principles and doctrines forged by the common law and domestic UK legislation which are concerned with the minimisation of the domination exerted by an employer over an employee.

### 5. A normative programme for labour laws

In the previous section, we provided a fairly rough sketch as to how Lovett's formulation of social justice as non-domination can account for those individuals falling within the protective purview of labour laws. We also examined how it could assist our understanding of what the discipline actually includes in content and scope in terms of UK law. The question, however, is whether it also has the capacity to construct a strong justificatory pillar for labour laws by providing a coherent narrative for a normative agenda or programme for the reform of the field. As such, at this juncture in the discussion, we are moving from the 'is' to the 'ought'. To put the point another way, if an explanation of labour laws as rules minimising domination is correct in descriptive terms, in what way can this assist us in the production of a normative framework that can be applied to justify specific labour laws, as well as to enable us to formulate how it ought to be conceived, and what ought to be included in its scope, coverage and content?<sup>93</sup> In essence, this is a debate about the normative value or salience of the concept.

It is suggested here that the technique of adopting the 'reflective equilibrium' case method - as advanced by Rawls<sup>94</sup> - is a useful way of testing and establishing the potential normative

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<sup>93</sup> This resonates with the importance of understanding the goals and objectives of labour law, on which, see, G. Davidov, "Articulating the Idea of Labour Law: Why and How" (2012) 3 *European Labour Law Journal* 130 and G. Davidov, *A Purposive Approach to Labour Law* (Oxford, OUP, 2016) 13-33.

<sup>94</sup> J. Rawls, 'Outline for a Decision Procedure in Ethics' (1951)) 60 *The Philosophical Review*, 177, J. Rawls, *A Theory of Justice* (1971) 46-53, and F. Lovett, *A General Theory of Domination and Justice* (Oxford, OUP, 2010)

utility of casting labour laws as rules or principles which ought to have the objective of minimising the degree of domination exerted by B over A - where B is a social actor who wields an arbitrary imbalance of power over A, a dependent social actor. The reflective equilibrium technique demands that we enquire what range of individuals our intuition tells us ought to be protected by labour laws, including what the content of labour laws ought to be, for example, by identifying a range of topics which our intuition suggests ought to fall within its scope and the extent of its coverage. Once such considered judgements are 'reached after due consideration, free from the influence of special interests and other disturbing factors',<sup>95</sup> it is then incumbent on us to enquire whether the formulation of non-domination expounded here can be applied as a sorting principle to provide a persuasive explanation for that range of individuals and topics as fully as possible. The point being made here can be particularised more precisely in terms of two sequential questions. First, if we identify the range of individuals labouring under an arrangement with an employing entity for the personal performance of work that our intuition suggests ought to be covered by labour laws, can we conceive of those social relationships as ones characterised by dependency, a social power imbalance and the potential for arbitrary decision-making? Secondly, if we were to identify the policy areas that our intuition directs ought to be included within labour law, then do the employment protections conferred by such labour laws have the effect of reducing the levels of dependency, arbitrariness and social power experienced by the individuals in the social relationships identified as worthy of legal protection pursuant to the first question? If our answer to both of these questions is 'yes', then domination-based reasoning abstracted from the civic republication tradition can be seen as a useful principle to justify the normative coverage and scope of labour laws.<sup>96</sup>

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27. For a critique of this 'intuitive' approach on the basis that it ingrains moral prejudices, see A. Amaya, *The Tapestry of Reason* (Oxford, Hart, 2015) 6 and 361-417.

<sup>95</sup> P. Pettit, 'Analytical Philosophy' in R. E. Goodin, P. Pettit and T. Pogge (eds.), *A Companion to Contemporary Political Philosophy*, 2<sup>nd</sup> edn, Vol. I, (Oxford, Blackwell Publishing, 2007) 11.

<sup>96</sup> This is similar to the approach adopted by the 'law of the labour market' scholars who argue that the justification for labour law should be grounded in terms of the stated policy aims.

In order to substantiate the assertion that the domination-based conception can be established as normatively valuable, we turn first to the categorisation of the class of individuals engaged in the personal performance of work that our intuition tells us ought to be covered by labour laws. First, it is contended that employees engaged on the basis of a contract of employment ought to be included pursuant to this process for the reason that the contract of employment can be characterised as a contract imbued with an authoritarian structure and power relation dimension to the benefit of the employer. Likewise, intuitively, we would point to semi-dependent workers engaged on the basis of “zero-hours”<sup>97</sup> or other types of “casual”<sup>98</sup> contracts for the personal performance of work, where the workers are left exposed or vulnerable to exploitation, or in a precarious position of potential disadvantage. Meanwhile, it is argued that our intuition would tend towards the exclusion of the genuinely self-employed from the protective cloak of labour laws on the basis that such individuals, by and large, operate a commercial business and take the risk of profit or loss.

Having identified employees and semi-dependent workers as classes of individual which our innate judgment identifies as deserving of employment protection, the next step in the process is to test whether persons involved in these relationships can be cast as dependent on the relevant employing entity and subject to power imbalances and arbitrary decision-making. For semi-dependent workers, this is undoubtedly so, given the general absence of control that they experience over their working hours and duties, together with the tendency for their pay to be low and dependency to be high. Although employees may have slightly more scope to negotiate with the employer, the degree of arbitrariness in decision-making to which they are subject suggests that they are also involved in relationships characterised by domination. These relationships can be contrasted with the independent contractor plumber

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<sup>97</sup> A “zero-hours” contract is a contract for the personal performance of work that provides that the individual service provider has no guaranteed hours of work and that he/she agrees to be potentially available for work, although not obliged to accept any work when offered by the hirer of his/her labour.

<sup>98</sup> A “casual” contract is a contract for the personal performance of work that provides that the individual service provider is not obliged to accept any work when offered by the hirer of his/her labour and that the latter is not obliged to make any work available to that individual.



or IT consultant, where the respective levels of dependency, power imbalance and arbitrariness are likely to be much lower. Seen from this perspective, the results of the application of the domination-based criterion marry up with our intuitive response to the first question in the preceding paragraph. Indeed, once the reflective equilibrium technique is applied and the social relationships identified as intuitively deserving of labour law protection are viewed against an evaluation for the presence of the three characteristic hallmarks of domination, it can be seen that the range of individuals and social relationships are likely to be over-inclusive of the current state of labour law in many jurisdictions. To that extent, the domination construct can be perceived as opening up avenues for reform in the sense of extending the protective coverage of labour laws.<sup>99</sup>

We now turn to probe our intuition regarding the various policy fields that ought to be contained within the subject of labour law. For reasons of space constraints, only three particular topics will be chosen here. First, it seems reasonable to conceive of labour laws as norms that ought to be partly designed to provide certain procedural and/or substantive protections for employees and semi-dependent workers in the context of dismissal/discharge, e.g. wrongful and unfair dismissal/discharge laws. Likewise, our intuition would also suggest certain pay protection regulations, e.g. minimum wage and wage protection norms, and rules to police discretionary powers retained by the employer and ensure that employing entities treat employees consistently and provide reasonable notice of proposed variations in managerial practices. Having established that these areas for regulation accord with our intuition, the question is whether wrongful and unfair dismissal/discharge laws, pay protection regulations and good faith controls, such as the common law implied term of mutual trust and confidence in UK labour law, function in a manner which reduces the domination of the employee or worker. First, as recognised by

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<sup>99</sup> Of course, whilst this takes labour law in a progressive worker-friendly direction, it may dull the edge off of the claims made by the discipline: M. Freedland 'From the Contract of Employment to the Personal Work Nexus' (2006) 35 *Industrial Law Journal* 1, 28–9 and M. Weiss, 'Re-Inventing Labour Law?' in G. Davidov and B. Langille (eds.), *The Idea of Labour Law* (Oxford, OUP, 2011) 48–9.

Pettit,<sup>100</sup> wrongful and unfair dismissal/discharge laws minimise such domination by restricting the power of the employer to fire at will, for bad, or no cause at all. Meanwhile, as demonstrated by Davidov,<sup>101</sup> minimum wage legislation reduces the dependency of the employee or semi-dependent workers on the employing entity by introducing a measure of redistribution of resources and power from the latter to the former in the relationship. As for the implied terms of good faith or mutual trust and confidence, to the extent that they control the power imbalance in personal work relationships and the level of arbitrariness exerted by the employer, it is abundantly clear that part of their ethos is to produce a diminution in domination.

## 6. Conclusion

The approach pursued in this chapter represents an attempt to promote a research agenda for the progressive reform of labour law which affirms a prime position for political theory and democracy in the various justifications and narratives for regulatory intervention. It has sought to achieve this by pinpointing the evident utility of civic republican non-domination ideology, which is an approach to political theory that is democratically thick, being counterpoised somewhere between the modern liberal-contractualist theory expounded by adherents such as Rawls<sup>102</sup> on the one hand,<sup>103</sup> and the communitarianism of political philosophers such as Sandel<sup>104</sup> on the other.<sup>105</sup> By harnessing this particular school of political thought, the aspiration is that worker-protective concerns can be restored to a central

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<sup>100</sup> P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy*, (Cambridge, CUP, 2012) 115.

<sup>101</sup> G. Davidov, *A Purposive Approach to Labour Law* (Oxford, OUP, 2016) 57-58 and 77-82 and G. Davidov, 'A Purposive Interpretation of the National Minimum Wage Act' (2009) 72 *Modern Law Review* 581, 586-594.

<sup>102</sup> J. Rawls, *A Theory of Justice* (Oxford, OUP, 1971).

<sup>103</sup> P. Pettit, 'Analytical Philosophy' in R. E. Goodin, P. Pettit and T. Pogge (eds.), *A Companion to Contemporary Political Philosophy*, 2<sup>nd</sup> edn, Vol. I, (Oxford, Blackwell Publishing, 2007) 9-13.

<sup>104</sup> M. Sandel, *Liberalism and the Limits of Justice* (Cambridge, CUP, 1982). See also A. Ryan, 'Liberalism' in R. E. Goodin, P. Pettit and T. Pogge (eds.), *A Companion to Contemporary Political Philosophy*, 2<sup>nd</sup> edn, Vol. I, (Oxford, Blackwell Publishing, 2007) 360-361.

<sup>105</sup> See C. Laborde 'Republicanism' in M. Freeden, L. T. Sargent and M. Stears, *The Oxford Handbook of Political Ideologies* (Oxford, OUP, 2013) 516 and 519-520.

position in the decision-making processes of state, supranational and economic agents.<sup>106</sup> Its strong relationship with democratic principles also ensures it is an approach that enhances the claims of labour in much the same way as casting labour laws as human rights increases the purchase of social policies.<sup>107</sup> In that vein, it is contended that it warrants a greater degree of attention as a justification for labour laws that it has hitherto received, with future research focussing on the weaknesses and strengths of the theory in greater depth relative to the other traditional rationales for intervention, including whether the central organising device of the contract of employment is the most fitting, and sufficiently flexible institution, to act as an appropriate manifestation of the conceptualisation of labour law as non-domination.

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<sup>106</sup> See R. Dukes, *The Labour Constitution* (Oxford, OUP, 2015) 196.

<sup>107</sup> C. Fenwick and T. Novitz, 'Conclusion: Regulating to Protect Workers' Human Rights' in C. Fenwick and T. Novitz (eds.) *Human Rights at Work: Perspectives on Law and Regulation* (Oxford, Hart Publishing, 2010) 587-588.